

**BEFORE THE MONTGOMERY COUNTY  
BOARD OF APPEALS**

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS  
Stella B. Werner Council Office Building  
Rockville, Maryland 20850  
(240) 777-6660**

**IN THE MATTER OF:**  
**JAN-PAUL A. KOPINSKI**  
Petitioner

Jan-Paul A. Kopinski

For the Petition

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Robert Goff

Department of Housing and  
Community Affairs

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Board of Appeals Case No. S-2852  
(OZAH Case No. 13-07)

Before: Martin L. Grossman, Hearing Examiner

**HEARING EXAMINER'S REPORT AND RECOMMENDATION**

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## I. STATEMENT OF THE CASE

Petition No. S-2852, filed on August 21, 2012, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in the basement of an existing single-family home located at 2010 Wallace Avenue, Silver Spring, Maryland, on land in the R-90 (Residential, One-family, Detached) Zone. The property's legal description is Lot 31, Block 5, of the Glenallan Subdivision in Silver Spring. The tax account number is 03502367.

The Hearing was scheduled for January 31, 2013, by notice dated August 23, 2012 (Exhibit 13). Technical Staff at the Maryland-National Capital Park and Planning Commission (M-NCPPC), in a report issued October 24, 2012, recommended approval of the special exception, with conditions. Exhibit 14.<sup>1</sup>

The Department of Housing and Community Affairs (DHCA) inspected the property on December 28, 2012. Housing Code Inspector Robert Goff reported his findings in a memorandum dated January 24, 2013 (Exhibit 15). Mr. Goff determined that the accessory apartment has 418 square feet of habitable space, and occupancy will be limited to two unrelated persons or a family not exceeding three persons.

One letter of opposition, dated January 28, 2013, was filed by the next-door neighbors, Roger and Jeannie Williams. They complain of uncut grass, excessive numbers of cars parked in the neighborhood and other alleged rental units in the neighborhood. Exhibit 16.

A public hearing was convened on January 31, 2013, as scheduled, and Petitioner Jan-Paul A. Kopinski appeared *pro se*. Also testifying was DHCA Inspector Robert Goff. Petitioner executed an affidavit of posting (Exhibit 17), and identified plans and photos regarding the site. He adopted the findings in the Technical Staff Report (Exhibit 14) and in the Housing Code Inspector's Report (Exhibit 15), as Petitioner's own evidence (Tr. 6-7). He also agreed to meet all

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<sup>1</sup> The Technical Staff report is frequently quoted and paraphrased herein.

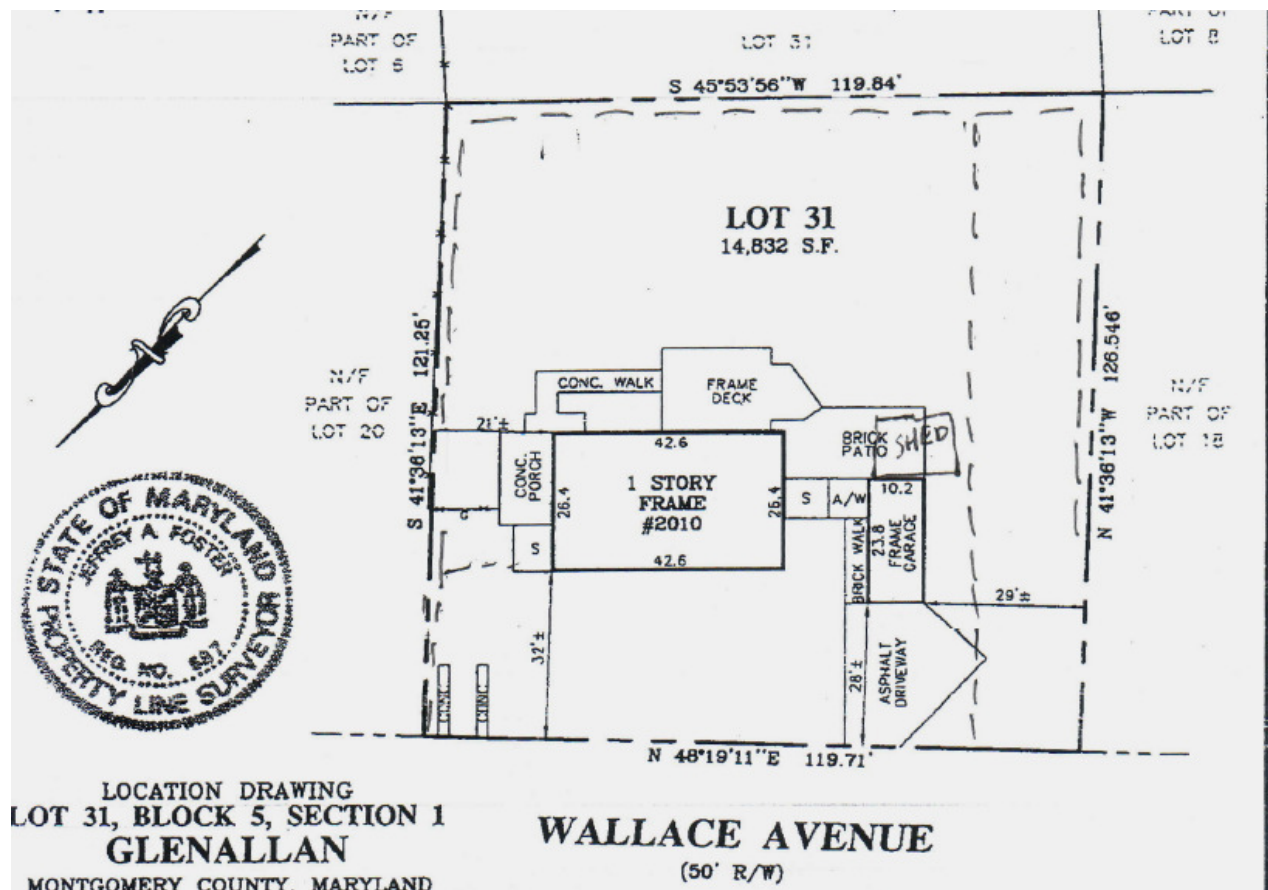
the conditions set forth in both reports. Tr. 7-8. The record was held open till February 7, 2013, to await the filing of the transcript, and the record closed, as scheduled.

There are no non-inherent characteristics of this site or use, and the petition meets all of the statutory criteria. The Hearing Examiner therefore recommends that the petition be granted, with conditions.

## II. FACTUAL BACKGROUND

### A. The Subject Property and the Neighborhood

The subject property is located at 2010 Wallace Avenue, Silver Spring, Maryland in the Glenallan Subdivision. The home is in the R-90 Zone, on a 14,832 square-foot, rectangular lot, as is depicted in the site plan (Exhibit 4):



Technical Staff described the property as follows (Exhibit 14, p. 2):

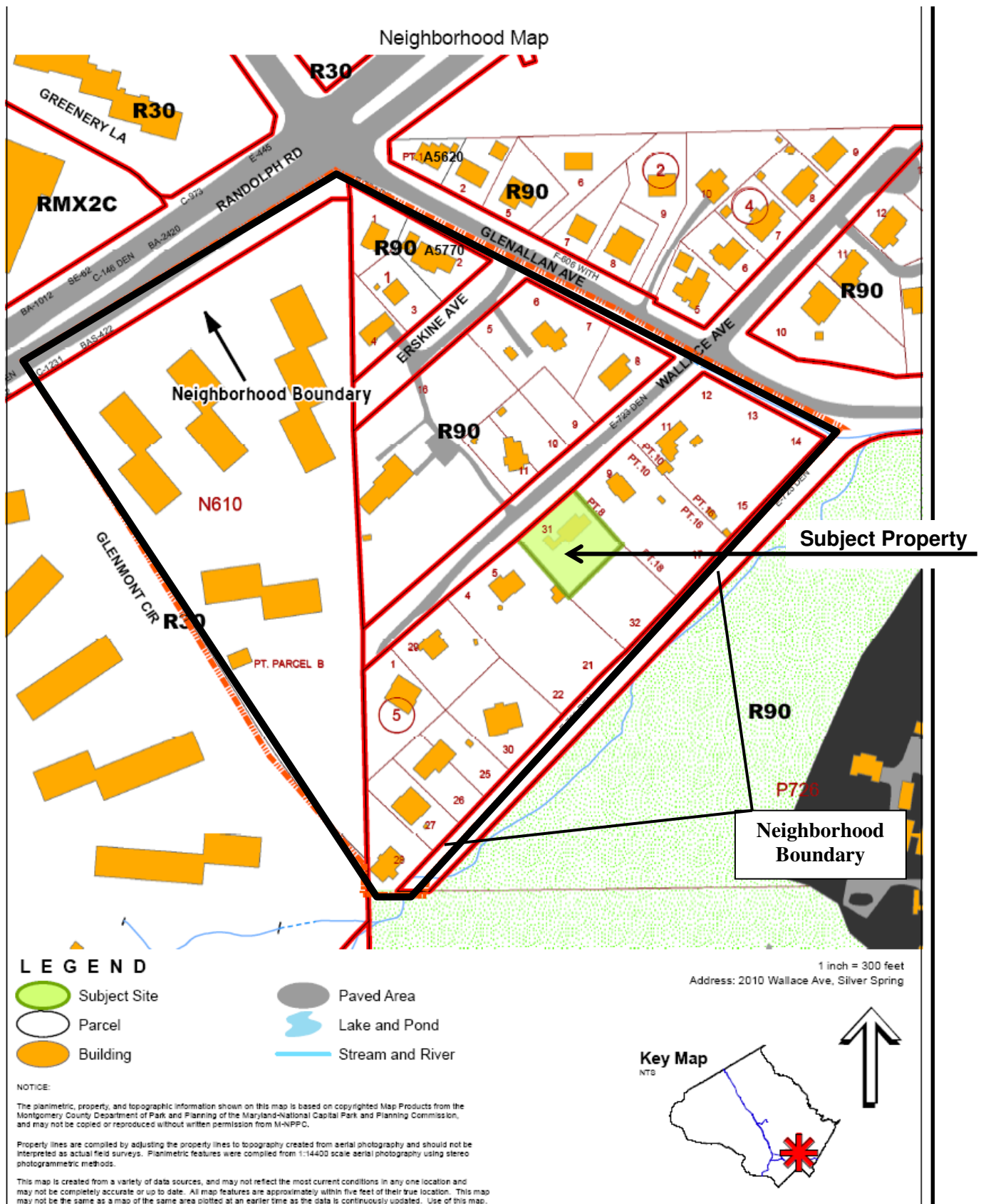
... The site, described as Lot 31, Block 5, "Glenallan," fronts on Wallace Avenue and has a relatively flat front yard with many shrubs and shade trees on the property. There is a significant slope from the house's front façade towards the back yard. There are no sidewalks along Wallace Avenue, and there is adequate on-site lighting. Vehicular access to this site is via Wallace Avenue . . .

Staff also noted that the subject property can accommodate up to 6 parked vehicles in two driveways. The front of the home is depicted below in a photograph from Exhibit 9:



The subject site is about 400 feet west of Glenallan Avenue, and about 900 feet south of Randolph Road, as can be seen on the Neighborhood Map discussed below.

Technical Staff defined the general neighborhood as bounded by Glenallan Avenue to the north, Wheaton Regional Park to the south and east, and Glenmont Forest Apartment Complex to the west. Exhibit 14, p. 2. The Hearing Examiner accepts this neighborhood definition, and it is shown on the next page on a Neighborhood Map supplied by Staff (Attachment 2, to Exhibit 14).





Technical Staff reports that the neighborhood consists primarily of residential dwellings zoned R-90, and the area is depicted in an aerial photograph supplied by Staff (Exhibit 14, p. 3):



“There is one non-residential use within the neighborhood, the Wheaton Regional Park; also zoned R-90. No other special exception for an accessory apartment exists in the neighborhood; however there are two special exceptions, a daycare for 40 children and a non-resident medical practice within the defined neighborhood.” Exhibit 14, p. 2.

### **B. The Proposed Use**

The Petitioner is seeking a special exception to allow an accessory apartment in the basement of his existing home. According to Petitioner, the immediate use of the apartment, which already exists, is to provide separate living space for his parents, with the possibility of renting the apartment to paid tenants in the future. Exhibit 3. The size of the apartment was estimated by Technical Staff as 1,032 “gross square feet” (Exhibit 14, p. 11), and measured by the Housing Code Inspector as 809.4 square feet, 418 square feet of which is habitable space (Exhibit 15, p. 2). The

apartment entrance will be on the southeastern side of the home, and it is depicted below in a photograph from Exhibit 9:

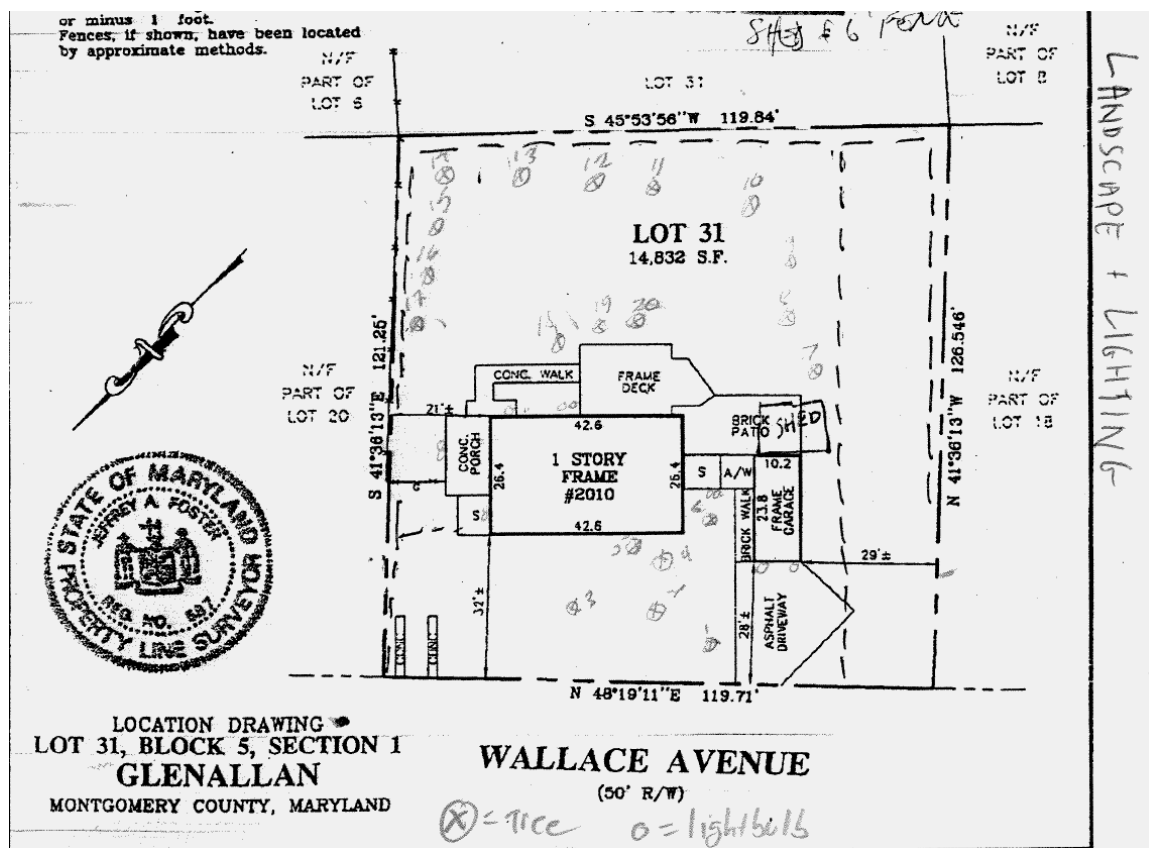


Accessory Apt  
Entrance

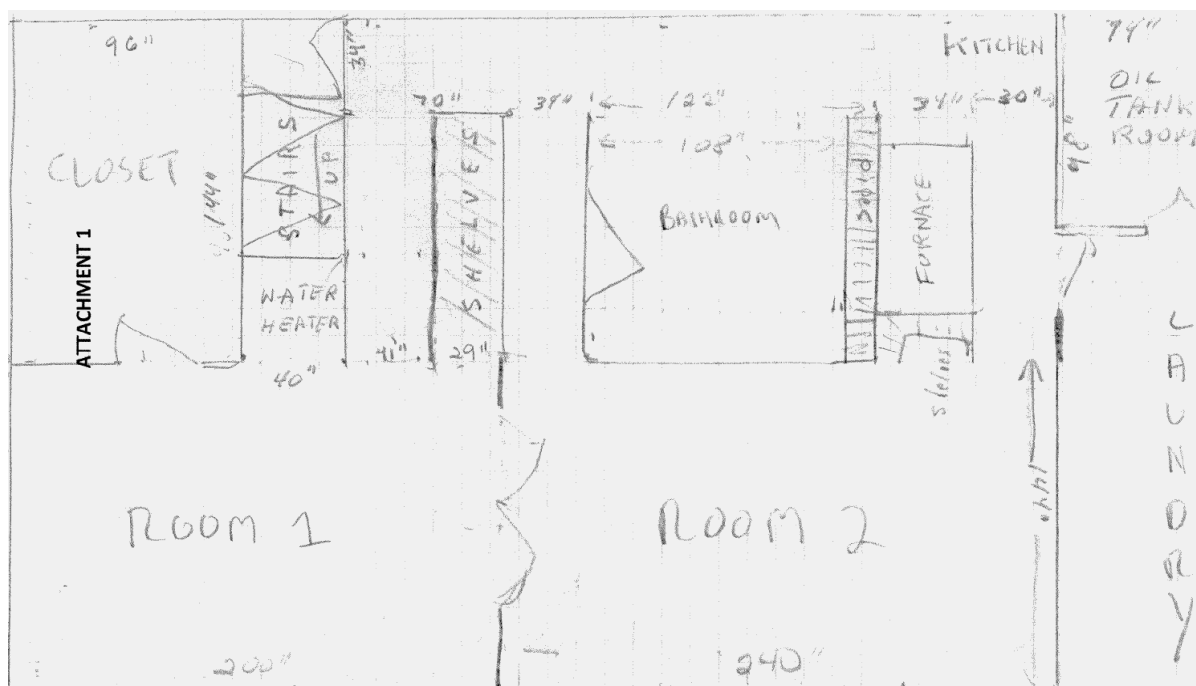
As noted by Technical Staff, the accessory apartment entrance is accessed from a loose gravel path via a gravel driveway. The entrance to the apartment is illuminated by typical residential lighting on a motion sensor. Exhibit 14, p. 2. Staff also found that no direct light would intrude into any adjacent residential property. Exhibit 14, p. 9.

Staff also reports that the site contains no forest, streams, wetlands, or environmental buffers and “[t]he proposed project is in compliance with the Environmental Guidelines. Additionally, this site is not subject to Chapter 22A, Montgomery County Forest Conservation Law.” Exhibit 14, p. 4.

The Landscape and Lighting Plan (Exhibit 6), is reproduced on the next page:



The Floor Plan of the accessory apartment (Exhibit 5), shown below, lists a kitchen and a bathroom, but is rather non-specific regarding the use of Rooms 1 and 2; however, Technical Staff states that there will be a living area, a kitchen, a bedroom and a bathroom. Exhibit 14, p. 2.





The Department of Housing and Community Affairs (DHCA) inspected the property on December 28, 2012, and Housing Code Inspector Robert Goff reported his findings in a memorandum dated January 24, 2012 (Exhibit 15). Mr. Goff determined that the accessory apartment has 418 square feet of habitable space, and occupancy will be limited to two unrelated persons or a family not exceeding three persons. The substance of his report is set forth below:

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The preliminary inspection was conducted on 12-28-2012. The Accessory located in the cellar of the house. The issues regarding Accessory Apartment standards are as follows:

1. Install egress window in bedroom. Window must be no more than 44" from floor to window opening.
2. Secure all baseboard heaters in all rooms.
3. Patch all holes and paint all walls and ceilings in basement.
4. Replace broken window in living room.
5. Replace door to HVAC closet.
6. Box in wire from bedroom to kitchen stove.
7. Finish drywall at kitchen doorway.
8. Replace kitchen floor.
9. Install doors on kitchen cabinets.
10. Bulk head going into kitchen must be no less than 78" from floor. The current height is 73".
11. Secure all outlet boxes in basement.
12. Install smoke detector in hallway outside of bedroom.
13. Remove all solid waste / pizza boxes. beer bottles. boxes and papers from basement and basement must be cleaned.
14. Have HVAC system and flue inspected by a licensed contractor.
15. The driveway will accommodate 2 cars.
16. There is limited street parking.
17. There is 418 sq feet of habitable space. The total sq feet of the Accessory Apartment is 809.4. 2 people can live in the unit or a family of 3.

Mr. Goff testified that he sees no reason why the accessory apartment cannot be approved, if the recommended conditions are met. Tr. 22. Although Mr. Goff stated in his report that the driveway will accommodate only 2 cars and that there is limited on-street parking, the availability of both off-street and limited on-street parking was confirmed by the Housing Code Inspector at the hearing. Tr. 16-17. Petitioner testified that there are two driveways. The main one will hold his

two cars and any guests' cars, and there is a second driveway for the accessory apartment that holds two cars. Tr. 17-18, 27. Technical Staff reported that six parking spaces are available on the property (Exhibit 14, p. 6), and provided pictures of both driveways in Attachment 3 to their report:



Figure 3: Driveway leading to accessory apartment



Figure 6: Second driveway

Mr. Goff also raised a question as to whether the accessory apartment is actually subordinate to the main dwelling since the SDAT printout of the Maryland State tax records for the property (Exhibit 18) indicated an enclosed area of only 1,092 square feet, and the accessory apartment is 809.4 square feet. Technical Staff listed the total enclosed area as about 2,249 square feet, based on information supplied by Petitioner. Exhibit 14, p. 11. The Hearing Examiner finds that the SDAT printout does not include the basement space in its calculation of the “enclosed area,” even though that area is finished. Since the main unit is considerably larger than the accessory apartment, the Hearing Examiner finds that the accessory apartment is subordinate to the main dwelling within the intended meaning of Zoning Ordinance §59-G-2.00(a)(9).

Technical Staff discussed transportation issues in their report (Exhibit 14, p. 4):

The proposed application satisfies the Local Area Transportation Review and the Policy Area Mobility Review tests, and would not have any adverse effects on the roadway or nearby pedestrian facilities. Staff estimates that two additional vehicle trips would be generated in the A.M. and P.M. peak-hours.

Given this evidence, the Hearing Examiner finds that the proposed accessory apartment will not unduly burden local transportation facilities and that there is adequate parking to accommodate both the owners and the accessory apartment tenants.

Based on this record, the Hearing Examiner finds that the proposed special exception will not cause non-inherent adverse effects on the neighborhood warranting denial of the petition.

### **C. Neighborhood Response**

The only response from the community is a single opposition letter, dated January 28, 2013, filed by the next-door neighbors, Roger and Jeannie Williams. They complain of uncut grass, excessive numbers of cars parked in the neighborhood and other alleged rental units in the neighborhood. Exhibit 16. There was no opposition testimony at the hearing.

Petitioner responded to the allegation of uncut grass in his testimony at the hearing, stating that he had been out of town and that he cut the grass when the County advised him that it was a problem. He does not have a fence and does not overflow his on-site parking ordinarily. Tr. 24-27.

Since Technical Staff reports that there are no other accessory apartments in the neighborhood, there is ample on-site parking for the proposed use and Petitioner will be required to maintain the home in accordance with County Housing regulations, the Hearing Examiner finds nothing in the opposition letter which can serve as a basis for denial of the application.

### **D. The Master Plan**

The subject property is covered by the 1989 Kensington-Wheaton Master Plan. The property is zoned R-90 for single-family detached housing, and Zoning Ordinance §59-C-1.31(a) permits accessory apartments by special exception in the R-90 Zone. The Master Plan does not have any specific guidance for the property in question, but two objectives of the Plan are “[t]o protect and stabilize the extent, location, and character of existing residential and commercial land uses [and t]o

maintain the well established low-to medium-density residential character which prevails over most of the planning area.” (page 40). Technical Staff found that the proposed accessory apartment would further these objectives. “Staff believes that the proposed application is consistent with the Master Plan objectives, as the applicant is not proposing to alter the existing residential appearance of the property to accommodate this request, and is maintaining the residential appearance of this site.” Exhibit 14, p. 4.

The Hearing Examiner notes that the Master Plan also recommends maintaining “a range of housing types and prices throughout the planning area” (page 41), and he concludes that the planned use, an accessory apartment in a single-family detached home, is not inconsistent with the goals and objectives of the Kensington-Wheaton Master Plan.

### **III. SUMMARY OF HEARING**

At the hearing, testimony was heard from Petitioner Jan-Paul A. Kopinski and from Housing Code Inspector Robert Goff. There was no opposition testimony. The record was held open for seven days to allow for filing of the transcript.

#### **Jan-Paul A. Kopinski (Tr. 6-28):**

Petitioner adopted the findings in the Technical Staff Report (Exhibit 14) and in the Housing Code Inspector’s Report (Exhibit 15), as Petitioner’s own evidence. Tr. 6-7. He also agreed to meet all the conditions set forth in both reports. Tr. 7-8. Petitioner further testified that all the external lighting is residential in style, and he did not intend to make any external changes to the site. Tr. 11.

Petitioner executed an affidavit of posting (Exhibit 17) and identified photos he took of the premises (Exhibit 9). He also identified his submitted plans (Exhibits 4, 5 and 6) and responded to the sole opposition letter, stating that he had been out of town and that he was not aware there was



an issue regarding cutting the grass until the County informed him, after which he cut the grass. He does not have a fence and does not overflow his on-site parking ordinarily. Tr. 24-27.

Petitioner testified that there are two driveways on his property. The main one will hold his two cars and any guests' cars, and there is a second driveway reserved for the accessory apartment tenants that holds two cars. Tr. 17-18, 27.

Housing Code Inspector Robert Goff (Tr. 15-27):

Housing Code Inspector, Robert Goff, testified that he inspected the premises on December 28, 2012, and that his findings are set forth in his report of January 24, 2013 (Exhibit 15). Tr. 15-16. He stated that the unit has 418 square feet of habitable space, and occupancy will be limited to two unrelated persons or a family not exceeding three persons. Tr. 16-18.

Mr. Goff raised a question as to whether the accessory apartment is actually subordinate to the main dwelling since the SDAT printout of the Maryland tax records for the property (Exhibit 18) indicated an enclosed area of only 1,092 square feet, and the accessory apartment is 809.4 square feet. Tr. 18-21.

Although Mr. Goff stated in his report that the driveway will accommodate only two cars and that there is limited on-street parking, he testified at the hearing that on-street parking is not restricted and that by "limited" parking, he meant that sometimes there were cars parked on the street when he inspected. Moreover, he confirmed that there is a two-car driveway for the tenants, and there is another driveway that will hold four to five cars. Tr. 16-17.

Mr. Goff testified that he sees no reason why the accessory apartment cannot be approved, if the recommended conditions are met. Tr. 22.

#### **IV. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is

compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioner will have satisfied all the requirements to obtain the special exception, if he complies with the recommended conditions (Exhibit 14).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

#### **A. Standard for Evaluation**

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational

characteristics are necessarily associated with an accessory apartment. Characteristics of the proposed accessory apartment that are consistent with the “necessarily associated” characteristics of accessory apartments will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with accessory apartments, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff lists the following inherent characteristics of accessory apartments (Exhibit 14, p. 4):

- (1) the existence of the apartment as a separate entity from the main living unit, but sharing a party wall with the main unit;
- (2) the provision within the apartment of the necessary facilities, spaces and floor area to qualify as a habitable space under the Building Code;
- (3) provision of a separate entrance and walkway and sufficient lighting;
- (4) provision of sufficient parking;
- (5) the existence of an additional household on the site; and
- (6) additional activity from that household, including the potential for additional noise.

The Hearing Examiner concludes that, in general, an accessory apartment has characteristics similar to a single-family residence, with only a modest increase in traffic, parking and noise that would be consistent with a larger family occupying a single-family residence. Thus, the inherent effects of an accessory apartment would include the fact that an additional resident (or residents) will be added to the neighborhood, with the concomitant possibility of an additional vehicle or two.

Technical Staff announced its findings as follows (Exhibit 14, pp. 4-5):

Staff finds that the size, scale, and scope of the requested use are minimal, and that any noise, traffic, neighborhood disruption, or environmental impacts associated with the use would be slight. There are no unusual characteristics of the site. Staff concludes that there are no non-inherent, adverse effects arising from the accessory apartment sufficient to form a basis for denial.

The Hearing Examiner agrees with Staff's assessment. Considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes, as did the Technical Staff, that there would be no non-inherent adverse effects from the proposed use.

### **B. General Conditions**

The general standards for a special exception are found in Zoning Code §59-G-1.21(a). The Technical Staff report, the Housing Code Inspector's report, the exhibits and the testimony at the hearing provide ample evidence that the general standards would be satisfied in this case.

#### **Sec. 59-G-1.21. General conditions.**

**§5-G-1.21(a)** *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

*(1) Is a permissible special exception in the zone.*

Conclusion: An accessory apartment is a permissible special exception in the R-90 Zone, pursuant to Code § 59-C-1.31(a).

*(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.00 for an accessory apartment, as outlined in Part IV. C, below.

*(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use*



*objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject property is covered by the 1989 Kensington-Wheaton Master Plan. The property is zoned R-90 for single-family detached housing, and Zoning Ordinance §59-C-1.31(a) permits accessory apartments by special exception in the R-90 Zone. The Master Plan does not have any specific guidance for the property in question, but two objectives of the Plan are “[t]o protect and stabilize the extent, location, and character of existing residential and commercial land uses [and t]o maintain the well established low-to medium-density residential character which prevails over most of the planning area.” (page 40). Technical Staff found that the proposed accessory apartment would further these objectives. Exhibit 14, p. 4. The Hearing Examiner notes that the Master Plan also recommends maintaining “a range of housing types and prices throughout the planning area” (page 41), and he concludes that the planned use, an accessory apartment in a single-family detached home, is not inconsistent with the goals and objectives of the Kensington-Wheaton Master Plan.

*(4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The accessory apartment is located in an existing dwelling and will not require significant external changes. It therefore will maintain its residential character. There will be sufficient parking, considering the availability of two on-site driveways. Traffic conditions will not be affected adversely, according to Transportation Planning Staff. There are no other accessory apartments in the defined neighborhood,

and the addition of this use will not affect the area adversely. Based on these facts and the other evidence of record, the Hearing Examiner concludes, as did Technical Staff, that the proposed use will be in harmony with the general character of the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: For the reasons set forth in answer to the previous section of this report, the special exception will not be detrimental to the use, peaceful enjoyment, economic value, or development of the surrounding properties or the defined neighborhood, provided that the special exception is operated in compliance with the listed conditions of approval.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found that the proposed use will not cause any objectionable adverse effects because “the accessory apartment is completely contained within the existing single-family dwelling and parking for the tenant can be accommodated in the driveway.” Exhibit 14, p. 6. Staff also found that “the entrance into the accessory apartment is illuminated with typical residential outdoor lighting and . . . no direct light would intrude into any adjacent residential property.” Exhibit 14, p. 9. Based on this record, the Hearing Examiner finds that the use will be indoors and residential, and that it will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: As discussed above, the Hearing Examiner finds that the proposed special exception will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff indicates that the subject site will be adequately served by existing public services and facilities (Exhibit 14, p. 7), and the evidence supports this conclusion.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception:*  
(i) *does not require approval of a new preliminary plan of subdivision; and*

*(ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact; then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision, and there is no currently valid determination of the adequacy of public facilities for the site, taking into account the impact of the proposed special exception. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR). As indicated in Part II. B. of this report, Transportation Planning Staff did do such a review, and concluded that the proposed accessory apartment use would add one additional trip during each of the peak-hour weekday periods. Exhibit 14, p. 4 and Attachment 5. Since the existing house, combined with the proposed accessory apartment, would generate fewer than 30 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study. Since the proposed use is estimated to generate only one additional peak-hour trip, PAMR is also satisfied. Therefore, the Transportation Staff concluded, as does the Hearing Examiner, that the instant petition meets all the applicable Growth Policy standards.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*



Conclusion: Based on the evidence of record, especially the Technical Staff's conclusion that "The proposal will not reduce the safety of vehicular or pedestrian traffic," the Hearing Examiner so finds. Exhibit 14, p. 7.

### **C. Specific Standards**

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 14), provide sufficient evidence that the specific standards required by Section 59-G-2.00 are satisfied in this case, as described below.

#### ***Sec. 59-G-2.00. Accessory apartment.***

*A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:*

##### ***(a) Dwelling unit requirements:***

*(1) Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.*

Conclusion: Only one accessory apartment is proposed.

*(2) The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:*

- (i) The lot is 2 acres or more in size; and*
- (ii) The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

Conclusion: The apartment is located in the basement of an existing house, and therefore shares a wall in common, as required for a lot of this size (under an acre).

- (3) *An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.*

Conclusion: No new addition or extension of the main dwelling is proposed. The accessory apartment is located in an existing dwelling.

- (4) *The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.*

Conclusion: The house was built in 1946. Exhibit 14, p. 10. It therefore meets the “5 year old” requirement.

- (5) *The accessory apartment must not be located on a lot:*

- (i) *That is occupied by a family of unrelated persons; or*
- (ii) *Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) *That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

Conclusion: The proposed use will not violate any of the provisions of this subsection. A condition is recommended in Part V of this report to ensure compliance with this provision.

- (6) *Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.*

Conclusion: Access to the accessory apartment will preserve the appearance of a one-family dwelling. The apartment entrance is separate from the main entrance and not visible from the street. There will thus be no change to the home’s residential appearance.

- (7) *All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.*

Conclusion: No external modifications are proposed.

- (8) *The accessory apartment must have the same street address (house number) as the main dwelling.*

Conclusion: The accessory apartment will have the same address as the main dwelling.

- (9) The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.*

Conclusion: The size of the apartment was estimated by Technical Staff as 1,032 “gross square feet” (Exhibit 14, p. 11), and measured by the Housing Code Inspector as 809.4 square feet, 418 square feet of which is habitable space (Exhibit 15, p. 2). It is thus well below the 1,200 square foot maximum for an accessory apartment.

The Housing Code Inspector raised a question as to whether the accessory apartment is actually subordinate to the main dwelling since the SDAT printout of the Maryland tax records for the property (Exhibit 18) indicated an enclosed area of only 1,092 square feet, and the accessory apartment is 809.4 square feet. Technical Staff listed the total enclosed area as about 2,249 square feet, based on information supplied by Petitioner. Exhibit 14, p. 11. The Hearing Examiner finds that the SDAT printout does not include the basement space in its calculation of the “enclosed area,” even though that area is finished. Since the main unit is considerably larger than the accessory apartment, the Hearing Examiner finds that the accessory apartment is subordinate to the main dwelling within the intended meaning of Zoning Ordinance §59-G-2.00(a)(9).

**59-G § 2.00(b) Ownership Requirements**

- (1) The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.*

Conclusion: The Petitioner will live in the main dwelling unit on the property.

- (2) *Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the Petitioner, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.*

Conclusion: According to Petitioner's deed (Exhibit 11) and Maryland Tax Records (Exhibit 18), Petitioner recorded the purchase of the property on March 19, 2010. The "one year" rule is therefore satisfied.

- (3) *Under no circumstances, is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.*

Conclusion: The Petitioner will receive compensation for only one dwelling unit as a condition of the special exception.

- (4) *For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.*

Conclusion: The Petitioner is the owner of the property. Exhibit 11.

- (5) *The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.*

Conclusion: Not applicable.

#### **59-G § 2.00(c) Land Use Requirements**

- (1) *The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.*



Conclusion: The subject lot is approximately 14,832 square feet in size, and therefore satisfies this requirement. According to Technical Staff, the subject property conforms to all applicable development standards of the zone. Exhibit 14, p. 7. The following table from the Technical Staff report summarizes the relevant development standards for the application and demonstrates Petitioner's compliance therewith. Exhibit 14, p. 8.

**Table 1: Applicable Development Standards – R-90 Zone**

Development Standards – R-90/Acc. Apt. (\$59-C-1.53)	Requirement	Provided
Maximum Building Height:	3 stories or 40 ft.	1 story
Minimum Lot Area	9,000 sq. ft.	14,832 sq. ft.
Minimum Lot Width at Front Building Line	75 ft.	±119 ft.
Minimum Lot Width at Proposed or Existing Street Line:	25 ft.	±119 ft.
Minimum Front Yard Setback:	30 ft.	±32 ft.
Minimum Side Yard Setback:	8 ft. one side, 25 ft. sum of both sides	±21 ft.; 50 ft.
Minimum Rear Yard Setback:	25 ft.	±60 ft.
Maximum Floor Area for Accessory Apartment	1,200 sq. ft. or less than 50% of GFA	±1,032 sq. ft. (45%)

(2) *An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use(see also section G-1.21 (a)(7) which concerns excessive concentration of special exceptions in general).*

Conclusion: As previously stated in this report, the Hearing Examiner concludes that the proposed special exception will not create an excessive concentration of similar uses since there are no other accessory apartments in the neighborhood.

*(3) Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:*

- (i) More spaces are required to supplement on-street parking; or*
- (ii) Adequate on-street parking permits fewer off-street spaces. Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.*

Conclusion: As discussed in Part II.B. of this report, there are six off-street spaces on Petitioner's driveways. There is also limited on-street parking. Technical Staff found that "Adequate parking exists for this accessory apartment." Exhibit 14, p. 13. The Housing Code Inspector agreed. The Hearing Examiner so finds.

#### **D. Additional Applicable Standards**

Not only must an accessory apartment comply with the zoning requirements as set forth in 59-G, it must also be approved for habitation by the Department of Housing and Community Affairs. As discussed in Part II. B. of this Report, the Housing Code Inspector's report (Exhibit 15) specifies certain conditions. Petitioner has agreed to meet all conditions, and will comply with directives of the Housing Code Inspector. Tr. 7-8.

#### **V. RECOMMENDATION**

Based on the foregoing analysis, I recommend that the Petition of Jan-Paul A. Kopinski, BOA No. S-2852, which seeks a special exception for an accessory apartment to be located at 2010 Wallace Avenue, Silver Spring, Maryland, be GRANTED, with the following conditions:

1. The Petitioner is bound by his testimony, representations and exhibits of record;
2. The Petitioner must comply with the following conditions set forth in the Memorandum of Robert Goff, Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 15):
  - a. Install egress window in bedroom. Window must be no more than 44" from floor to window opening.
  - b. Secure all baseboard heaters in all rooms.

- c. Patch all holes and paint all walls and ceilings in basement.
  - d. Replace broken window in living room.
  - e. Replace door to HVAC closet.
  - f. Box in wire from bedroom to kitchen stove.
  - g. Finish drywall at kitchen doorway.
  - h. Replace kitchen floor.
  - i. Install doors on kitchen cabinets.
  - j. Bulk head going into kitchen must be no less then 78" from floor. The current height is 73".
  - k. Secure all outlet boxes in basement.
  - l. Install smoke detector in hallway outside of bedroom.
  - m. Remove all solid waste / pizza boxes. beer bottles. boxes and papers from basement and basement must be cleaned.
  - n. Have HVAC system and flue inspected by a licensed contractor.
  - o. The driveway will accommodate 2 cars.
  - p. There is limited street parking.
  - q. There is 418 sq feet of habitable space. The total square feet of the Accessory Apartment is 809.4. [Up to]2 people can live in the unit or a family of [no more than] 3.
- 3. Petitioner must comply with the determination of the Housing Code Inspector as to limits on occupancy in the accessory apartment and must comply with any other directions of the Housing Code Inspector to ensure safe and code-compliant occupancy;
  - 4. Petitioner must occupy one of the dwelling units on the lot on which the accessory apartment is located;
  - 5. The accessory apartment must not be located on a lot that is occupied by a family of unrelated persons, or where there is a guest room for rent, a boardinghouse or a registered living unit;
  - 6. Petitioner must not receive compensation for the occupancy of more than one dwelling unit; and
  - 7. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: February 8, 2013

Respectfully submitted,



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Martin L. Grossman  
Hearing Examiner